IN THE HIGH COURT OF DELHI

R.S.A. No.286/2007

Shri Ramesh Kumar Handoo & Anr. ..... Appellants
! through: Mr.Sanjiv Bahl, Adv.

VERSUS

$ Shri Binay Kumar Basu ..... Respondent
^ through: Nemo.

% DATE OF DECISION: 19.11.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

PRADEEP NANDRAJOG, J. (Oral)

1. Appellants who were impleaded as defendants in a suit filed by Binay Kumar Basu have suffered 2 concurrent finding against them. They have approached this court by way of a second appeal.

2. It is not an ordinary litigation. The plaintiff of the suit is the father of appellant No.2. Appellant No.2 is the wife of appellant No.1. Meaning thereby father-in-law of appellant No.1 and father of appellant No.2 instituted the suit.

3. The admitted case of the parties is that the father is the perpetual lessee of the suit land on which a building stands

constructed.

4. Alleging that the plaintiff had allowed his daughter and his son-in-law to reside in the suit property in which even the plaintiff, as owner, was residing and that in November,2000 he had determined the right of his daughter and son-in-law to continue to reside in the suit property and inspite thereof they were not vacating the same, suit was filed on 14.11.2002 praying for a decree of mandatory injunction requiring defendants to leave the suit property.

5. In the written statement filed, a preliminary objection was raised that since the defendants were admittedly in possession of the suit property suit for mandatory injunction was not maintainable. That a suit for possession ought to be filed. On merits it was pleaded that even mother of appellant No.2 had contributed from her istridhan when construction was effected and for said reason even mother of defendant No.2 was the co-owner of the property. Additionally it was pleaded that even defendant No.2 had contributed in the construction of the property and on said account was a co-owner of the property. Lastly, a right under Section 60(b) of Indian Easement Act, 1882 was pleaded stating that defendant No.2, as a co-borrower, had raised loan from a bank and had executed works of a permanent character i.e. the building with the help of loan which was so taken and utilized to construct the

building.

6. Needless to state, the plaintiff denied that his daughter contributed a penny for the construction of the property. He admitted that his daughter was a co-borrower but pleaded that his daughter did not repay a single penny for return of the loan which was taken for constructing the house and that he had repaid the entire loan.

7. On the pleadings of the parties two issues were framed. Firstly, whether the plaintiff was entitled to decree for mandatory injunction and secondly whether the plaintiff was the owner of the suit property?

8. Issue No.2 was decided first and thereafter issue No.1 was decided by the learned Trial Judge vide judgment and decree dated 5.5.2007.

9. In respect of issue No.2, in view of the evidence led, learned Judge opined that the daughter has failed to establish that either her mother or she i.e. the daughter contributed a penny on the construction. On the fact of the daughter being a co-borrower a finding has been returned that the loan was taken from HDFC Bank and that the father had led evidence to establish that the entire loan was returned to HDFC Bank by him.

10. Discussing the testimony of the witnesses and the evidence led, learned Trial Judge has noted that the mother of

defendant No.2 was not produced as a witness. Learned Trial Judge has noted that the daughter deposed that her mother had contributed towards construction was so stated by her as told to her by the mother and her grand mother. Learned Trial Judge has held that in the absence of mother of defendant No.2 being produced in the witness box said statements of the daughter that her mother also contributed in the construction is not sufficient evidence to hold that it stands proved that even the mother contributed money when the house was constructed. The statement of the daughter that she had contributed towards construction of the house was sought to be proved through the testimony of DW-2 a person engaged in the supply of building material. No evidence was led to show that the daughter paid a single penny to DW-2 when building material was purchased. In fact DW-2 could not even prove any bill issued by him evidencing that he supplied any building material.

11. Taking note of the positive evidence led by the father of having repaid entire loan raised from HDFC Bank and taking note of the fact that the father was the perpetual lessee of the land, a finding has been arrived at by the learned Trial Judge that the plaintiff i.e. the father was the sole owner of the suit property.

12. This finding of fact has been affirmed by the First Appellate Court.

13. The finding on issue No.2 not only relates to a question of

fact and on said account would not be open to further scrutiny in a Regular Second Appeal, even on the evidence before the learned courts below I find no infirmity in the said finding.

14. Defence under Section 60(b) of the Indian Easement Act could succeed only when the daughter would have proved that she had spent money on the construction. As noted hereinabove no evidence was led by the daughter that she spent a penny on the construction. The fact that she was a co-borrower when loan was raised from HDFC Bank does not help her for the reason positive evidence has been led by the father to prove that it was he alone who repaid the entire loan to HDFC Bank.

15. Pertaining to the issue whether suit for mandatory injunction was maintainable, learned Trial Judge noted the decision cited by the appellants, namely JT 2005 (8) SC 509, *Joseph Severance & Ors. Vs. Benny Mathew & Ors.* View taken by the learned Trial Judge is that even as per the said judgment a suit for mandatory injunction alleging continued occupation by a licensee after license was revoked was held to be maintainable.

16. The first Appellate Court has concurred with the said view.

17. Indeed, in the afore-noted decision, Hon'ble Supreme Court was considering an appeal where the plaintiff was the licensor and had obtained a decree of mandatory injunction after terminating

the license.

18. Thus, a suit for mandatory injunction against a licensee would be maintainable after the license is revoked.

19. I may note a fact, not considered by the courts below, concept of permissive possession is different from the concept of a license. A child lives with his parents in the house of the parents under a permissive possession and not strictly as a licensee. No rights akin to the rights of a licensee are available to the child. In the instant case as stated in the plaint the daughter and her husband were residing jointly in the house of the father. All were sharing the entire accommodation.

20. Reverting to the decision of the Supreme Court in *Joseph Severance's* case (supra) in para 6 thereof it has been noted as under:-

> "Before the High Court the plea was taken for the first time that the suit was not maintainable being one for mandatory injunction and for prohibitory injunction and not one for recovery. Strictly speaking the question is not substantial question of law, but one whose adjudication would depend upon factual adjudication of the issue relating to reasonableness of time."

21. The aforesaid observations of the Supreme Court need a little clarification.

22. The correct position in law as explained by the Supreme Court is that a licensee whose license is terminated would not become a trespasser immediately upon determination of license.

He would have to be granted a reasonable time to vacate the licensed premises. Only after reasonable time expires would his status be akin to a trespasser. Meaning thereby concept of reasonable time for a licensee to vacate after a license is revoked depends upon the pleadings of parties. It is a question requiring factual adjudication relating to reasonableness of time.

23. As noted by the Supreme Court a factual foundation has to be laid in the pleadings.

24. In para 14 of its report the Supreme Court observed as under :-

> "The defendants did not specifically raise any plea that the time taken was unreasonable. No evidence was led. No specific plea was raised before the Trial Court and the first Appellate Court. The question of reasonable time was to be factually adjudicated. For the first time in the second appeal the dispute essentially founded on factual foundation could not have been raised."

25. It is urged by learned counsel for the appellants that as pleaded in the plaint the license was revoked in November,2000 and suit was filed on 14.11.2002.

26. Counsel seeks to urge that this is the unreasonable time for the suit to be instituted.

27. Counsel urged that the courts below have dealt with the issue of reasonableness of the time.

28. In my opinion the discussion by learned Trial judge is purely hypothetical for the reason learned Trial Judge has himself

noted in para 18 of the judgment and decree dated 5.5.2007 that during arguments an interesting point was raised. In my opinion, in the absence of pleadings laying a factual foundation the plea ought not to have been considered how-so-ever interesting it was.

29. Be that as it may, when permission granted to a married daughter to reside in the house is withdrawn by the father, taking note of the paucity of accommodation in Delhi, time of approximately 2 years granted to the daughter to move out of the house would be more than reasonable.

30. Further the issue of reasonableness has to be considered with respect to the minimum time to be granted to a licensee to vacate the licensed premises and not with respect to a extended time granted by way of bounty by the licensor.

31. In my opinion, for the reasons noted herein above, no substantial question of law arises for consideration.

32. Before concluding I would be failing if I do not note the observations in para 21 of the order passed by the learned appellate Judge.

33. In the judgment and decree dated 26.9.207, learned Appellate Judge has recorded a social philosophy which to my opinion ought not to find mention in the decision. Even otherwise the said observations reflect a gender bias and have to be ignored.

34. The Appellate Judge has noted that appellant No.2 as

daughter was living with her father and in the Indian social set up was expected to move out of her father's house to set up a matrimonial house as a daughter-in-law where her husband desired. Learned Appellate Judge has recorded that after marriage a daughter goes to her parental house more as a guest.

35. I am afraid, the view is loaded with gender bias. A daughter is not less than a son. After marriage daughter does not visit the house of her father as a guest. She comes as a family member. Just as after marriage a son visits his father so does a daughter. Status of a married daughter is no different than a married son.

36. I find no merits in the second appeal. The same is dismissed in limine.

November 19, 2007 **PRADEEP NANDRAJOG, J.**
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